LIBRARY
SUPREME COURT. MAR 5 1958

IN THE

Supreme Court of the United States

October Term, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Motion for Leave to File Brief *Amici Curiae*, in Support of Motion to Dismiss Appeal Filed by Respondents, and Brief

ASHER LANS,
64 Wall Street,
New York 5, N. Y.,
Attorney for Movants.

STANLEY N. QUELER,
64 Wall Street,
New York 5, N. Y.
Counsel for Movants.

INDEX

	PAGE
Motion for Leave to File Brief	1
Brief	4
Preliminary Statement	4
ARGUMENT:	
POINT I—The question raised by appellant has long been settled and presents no substantial federal question	5
POINT II—The appointment of a receiver of defendant-appellant's property in New York rests upon non-federal grounds	11
CONCLUSION	12

CASES CITED

Baglin v. Cusenier Co., 221 U. S. 580	6, 10
Bernstein v. N. V. Nederlandsche etc., 173 F. 2d 71	8
Bollack v. Societe Generale, etc., 263 App. Div. 601, 33 N. Y. S. 2d 986	6
Clark v. Willard, 292 U. S. 112, 294 U. S. 211	7
Compagnie fermiere de la Grand Chartreuse v. Rey, Tribunal Federal (Switzerland, July 11, 1913), 39 R. O. II 640, 652	7

PAGE

Etat Russe v. Rapit, Trib. Marseille, April 23, 1925, 52 Clunet 391, aff'd by the Ct. of Cassation, 55 Clunet 674 7

Ex Parte Muir, 254 U. S. 522 12

Ex Parte Peru, 318 U. S. 578 10

Holzer v. Deutsche Reichsbahn Gesellschaft, 289 N. Y. S. 943, 160 Misc. 579 12

Kunglig, etc. v. Dexter & Carpenter, Inc., 32 F. 2d 195, 200 12

Lamont v. Travelers Insurance Company, 281 N. Y. 362, 372, 24 N. E. 2d 281 12

Lecouterir v. Rey (House of Lords, 1910), A. C. 262 7

Oliner v. American-Oriental Banking Corp., 252 App. Div. 212, 297 N. Y. S. 432, aff'd 277 N. Y. 588, 13 N. E. 2d 783 ..... 7, 8

Rothschild v. N. V. G., 194 Misc. 889, 88 N. Y. S. 2d 157 8

Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse (House of Lords, 1924), A. C. 112 7

Sedgwick, Collins & Co. v. Rossia Ins. Co. (House of Lords, 1927), App. Cases 95 7

The Jupiter (No. 31), (1927), P. D. 250, 253-5 7

The Navemar, 303 U. S. 68 ..... 6, 12

PAGE

U. S. v. Bank of New York & Trust Co., 296 U. S. 463 ..... 6, 10, 11

United States v. Belmont, 301 U. S. 324 ..... 6, 8, 9

U. S. v. Percheran, 7 Pet. 51, 87 6

U. S. v. New York Trust Co., 75 F. Supp. 583 7

United States v. Pink, 315 U. S. 203 ..... 6, 8, 9

Vladikavkazsky Railroad Company v. New York Trust Company, 263 N. Y. 369, 378-9 5

Weinert v. Kinkel, 296 N. Y. 151, 71 N. E. 2d 445 8

Zwack v. Kraus Bros. & Co., 237 F. 2d 255 ..... 6, 10

STATUTES AND AUTHORITIES CITED

New York Laws, 1936, ch. 917 4

Section 977-b Civil Practice Act of New York 4

Borchard, "Treaties and Executive Agreements" (1945) 9

54 Yale L. J. 616, 645-8 9

Note (1945) 58 Harv. L. Rev. 612, 614 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Motion for Leave to File Brief *Amici Curiae*, in Support of Motion to Dismiss Appeal Filed by Respondents

---

May it Please the Court:

The undersigned, as counsel for Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek, as Executor of the Estate of Ernest Petschek, deceased, respectfully moves the Honorable Court for leave to file the accompanying brief, *amici curiae*, in support of the motion to dismiss the appeal previously filed by the respondents. Counsel for appellant has refused to consent to the filing of this brief. Counsel for respondents originally stated that he would consent to the filing of this brief upon various conditions outlined by such counsel, but the undersigned has been unable to ascertain whether or not counsel for respondents would consent to the filing of this brief.

The following special reasons are set forth in support of this motion:

1. The movants are the joint owners of what is believed to be the largest single group of creditor claims against defendant-appellant's New York assets. These claims are owned by the four movants, as equal co-tenants. So much of the movants' claims are may be readily given a dollar value aggregate more than $850,000.00, on information and belief. In addition, the movants have substantial claims, not capable at this time of being stated with mathematical precision, based upon conversion of securities, or negligent custodianship of securities, by Zivnostenska Banka, or its predecessors. Moreover, movants as co-tenants have seizeable interests in Zivnostenska Banka as stockholders.

2. The movants are all citizens and residents of the United States and of the State of New York, unlike the plaintiff-respondent, who is a citizen and resident of Canada. Accordingly, the movants have a more substantial interest than does the plaintiff in the outcome of the appeal. The reason for this is that Subdivision 16 of Section 977-b of the New York Civil Practice Act (reprinted on page 33 of the Jurisdictional Statement filed by appellant) provides that the allowed claims of American residents and domestic corporations are entitled to priority of payment. The assets held by the receivers appointed under Section 977-b of the Civil Practice Act, I am informed, amount to less than $500,000. I am further advised that there are a large number of claimants, other than the present movants, who reside in the United States. It is therefore apparent that the group of claimants who are citizens and residents of the United States and New York should be represented on this motion.

3. It is further respectfully submitted that a number of the reasons requiring dismissal of the present appeal were not set forth in the able brief submitted on behalf of plaintiffs-respondents. These issues are set forth in the brief submitted herewith.

It is therefore respectfully requested that the motion for leave to file this brief *amici curiae* be granted.

Dated: New York, N. Y., February 26th, 1958.

ASHER LANS,
Attorney for Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek; as Executor of the Estate of Ernest Petschek, deceased, Movants, Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Brief of Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek, As Executor of the Estate of Ernest Petschek, Deceased, in Support of Motion to Dismiss Appeal

---

Preliminary Statement

Continuously since 1936, New York State has had in force legislation permitting the appointment of a receiver of the local assets of a dissolved, liquidated or nationalized foreign corporation or of a foreign corporation which has ceased to do business (New York Laws, 1936, ch. 917; Section 977-b Civil Practice Act of New York, reprinted in part in the Appendix to Appellant's Brief). Under the

cited section, receivers have under appropriate circumstances been appointed for the New York assets of dissolved or nationalized corporations domiciled in other states of the United States and in various foreign countries. In 1956, receivers were appointed for the New York assets of defendant-appellant, as a nationalized Czechoslovakian corporation. Defendant-appellant now asserts that such appointment and the applicability of Section 977-b to corporations organized in foreign countries derogates from the Federal Government's exclusive control of American international relations and justifies appeal to this Court. A motion to dismiss has been made on the ground that no substantial federal question is presented by the appeal.

ARGUMENT

POINT I

The question raised by appellant has long been settled and presents no substantial federal question.

A.

It is the established public policy of the State of New York that it will not enforce the confiscatory decrees of other jurisdictions. As was stated by the New York Court of Appeals in *Vladikavkazsky Railroad Company* v. *New York Trust Company*, 263 N. Y. 369, 378-9:

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets, and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary

> to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. * * *
>
> "Prior to recognition, we clearly intimated that our decision would have been the same if at the time recognition had been granted. James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 257, 146 N. E. 369, 37 A. L. R. 720."

Since this Court's decisions in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203, the New York courts have reiterated the state's public policy that it will not enforce a foreign law or judgment which confiscates property, with a situs in New York, unless there is in effect a specific Federal Treaty or Executive Agreement explicitly requiring acquiescence in such expropriation. *Bollack* v. *Societe Generale, etc.*, 263 App. Div. 601, 33 N. Y. S. 2d 986.

It has consistently been held that a state of the United States may decline, because of repugnancy to its public policy, to enforce the expropriatory ukases of foreign jurisdictions against property having its situs in the domestic forum. *U. S.* v. *Percheman*, 7 Pet. 51, 87; *The Navemar*, 303 U. S. 68; *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463; *Baglin* v. *Cusenier Co.*, 221 U. S. 580.

The applicable law has been most explicitly stated in the recent decision of the United States Court of Appeals for the Second Circuit in *Zwack* v. *Kraus Bros & Co.*, 237 F. 2d 255 (1956). The *Zwack* case involved the effect in the United States of nationalization decrees enacted by the Government of Hungary. The Court declared:

> "It is clear that the Hungarian Government could not directly seize the assets which have a situs in the state of forum. To allow it to do so indirectly

through confiscation or firm ownership would be to give its decree extra territorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do."

Similar decisions have been rendered by courts throughout the world. *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (House of Lords, 1924), A. C., 112; *The Jupiter* (No. 31), (1927), P. D. 250, 253-5; *Sedgwick, Collins & Co.* v. *Rossia Ins. Co.* (House of Lords, 1927), App. Cases 95; *Etat Russe* v. *Rapit,* Trib. Marseille, April 23, 1925, 52 Clunet 391, aff'd by the Ct. of Cassation, 55 Clunet 674; *Lecouterir* v. *Rey* (House of Lords, 1910), A. C. 262; *Compagnie fermiere de la Grand Chartreuse* v. *Rey,* Tribunal Federal (Switzerland, July 11, 1913), 39 R. O. II 640, 652.

It is further clearly established that a state of the United States may constitutionally exercise control over property within its jurisdiction, which property is owned by a foreign entity. The appointment of a receiver of so much of the property of an expropriated, liquidated or dissolved foreign corporation as is located within the forum is merely one method of exercising such control over domestic property. The constitutional power to control in a non-discriminatory manner foreign owned property within the forum, as by appointing a receiver under appropriate circumstances, has been held to be an inherent attribute of territorial sovereignty. *Clark* v. *Willard,* 292 U. S. 112, 294 U. S. 211; *U. S.* v. *New York Trust Co.,* 75 F. Supp. 583; *Oliner* v. *American-Oriental Banking Corp.,* 252 App. Div. 212, 297 N. Y. S. 432, aff'd 277 N. Y. 588, 13 N. E. 2d 783.

Contrary to appellant's implication, Section 977-b of the New York Civil Practice Act was not enacted and does not refer specifically to the New York assets of the National-

ized corporations domiciled behind the Iron Curtain. In fact, receivers have been appointed under the section for the New York assets of Netherlands corporations (*Rothschild* v. *N. V. G.*, 194 Misc. 889, 88 N. Y. S. 2d 157), of West German Companies (*Bernstein* v. *N. V. Nederlandsche etc.*, 173 F. 2d 71), and even of corporations organized under the laws of Delaware (*Weinert* v. *Kinkel*, 296 N. Y. 151, 71 N. E. 2d 445) and of Connecticut (*Oliner* v. *American-Oriental Banking Corporation*, 277 N. Y. 588, 13 N. E. 2d 783).

It seems to be appellant's position that the appointment of a receiver for its New York assets under Section 977-b of the Civil Practice Act derogates from the control of foreign relations by the Federal government. However, the cases cited by appellant in its jurisdictional statement do not support its position or even indicate the existence of any substantial federal question. For these cases all were the judicial aftermath of the Litvinov Assignment, which was an international agreement between the United States and Russia by which the United States consented to give extra-territorial validity to Soviet nationalization legislation.

As was said in *U. S.* v. *Pink*, 315 U. S. 203, at page 203: "A treaty is 'Law' of the Land' under the supremacy clause (Art. VI, ch. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have similar dignity." To repeat what this court stated in *U. S. v. Belmont*, 303 U. S. 324, at 327: " • • • no state policy can prevail against the international compart (the Litvinov Assignment) here involved."

However, there is no international compact between the Republic of Czechoslovakia and the United States by which the Federal Government has agreed to enforce or even recognize the nationalization legislation of Czechoslovakia,

and no such agreement has been or can be cited by appellant.

Accordingly, the reference by appellant to the *Pink* and *Belmont* cases and similar cases is inapposite. In the absence of an appropriate international agreement, the United States has no interest in, and no substantial federal question is presented by, the New York domestic policy as embodied in Section 977-b of the New York Civil Practice Act.

Appellant further contends that, under the *Pink* and *Belmont* decisions, *supra*, the mere recognition of the Czechoslovakian Government by the United States necessitates that all states of the United States give extra-territorial validity to Czechoslovakia's confiscatory decrees. This argument is based upon a misconception of the *Pink* and *Belmont* decisions. Ordinarily the United States would have made an agreement with respect to international property rights only through a treaty, approved by the Senate under Article II, Section 2 of the United States Constitution. The Litvinov Assignment, however, was an agreement effected by the President on his own authority. The contention that the failure to secure Senatorial consent stripped the Litvinov Assignment of binding effect domestically was overruled by this court in the *Pink* and *Belmont* cases because the agreement with relation to property rights was held to be an incident of recognition of a foreign government, which is an admitted executive function. *U. S.* v. *Belmont*, *supra*, at p. 330; Borchard, *"Treaties and Executive Agreements"* (1945), 54 *Yale L. J.* 616, 645-8; Note (1945), 58 *Harv. L. Rev.* 612, 614.

Contrariwise, the *Pink* and *Belmont* cases, *supra*, and other decisions of the Federal courts indicate that the mere recognition of a foreign government does not give

its corporations a magic immunity to general domestic legislation or make the non-discriminatory application of such legislation to domiciliary corporations of such foreign state a federal question. *Baglin* v. *Cusenier Co.*, 221 U. S. 580; *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463; *Zwack* v. *Kraus Bros. & Co.*, 237 Fed. 2d 255.

B.

Appellants further assert that "the foreign relations of the United States" are affected by the decision of the New York court herein and that therefore an appeal lies to this court.

It ill behooves a nationalized corporation of Communist Czechoslovakia to assert a sympathetic interest in American foreign policy. Moreover, it is well established and seem self-evident that the interest of the United States in domestic litigation, because of the alleged impact thereof on our foreign policy, may be asserted only by authorized officers of the Federal Government. See *Ex Parte Peru*, 318 U. S. 578.

Neither the Department of State, nor the Department of Justice, has appeared or intervened in this litigation at any stage. Accordingly, there is no merit whatever to appellant's contention that a substantial federal question is presented because American foreign policy may be affected by the decision of the New York court below.

POINT II

The appointment of a receiver of defendant-appellant's property in New York rests upon non-federal grounds.

A.

As appears from the title of the action, the appellant herein is a Czechoslovakian national corporation. It came into existence when the Czechoslovakian Government caused it to take over the assets of its predecessor, the Zivnostenska Banka, in accordance with Decree No. 102 of 1945 (Appendix to Appellant's Brief, p. 22). Subsequently, the National Assembly of the Czechoslovakian Republic enacted Law No. 31 of 1950, which provided for the seizure by the State Bank of Czechoslovakia of all the rights and obligations of the Zivnostenska Banka, National Corporation (Appendix to Appellant's Brief, p. 28).

When this action was commenced, the State Bank of Czechoslovakia interposed a claim of sovereign immunity. This claim was denied (R. 1, fols. 609-641), and its denial has not been appealed to this court. Hence, it must be conclusively presumed for purposes of this appeal that both defendant, Zivnostenska Banka, National Corporation, and the State Bank of Czechoslovakia were at all times subject to the processes of the New York State courts as ordinary private litigants. The New York courts based their jurisdiction on New York State's power to control private property within the forum. Therefore, no Federal question is presented by the appointment of a receiver over appellant's property having a situs within New York.

United States v. *Bank of New York & Trust Co.*, 296 U. S. 463, 478.

B.

Any privilege to assert the presence of a Federal question in the instant case has been waived. A claim of sovereign immunity or of special right under international law or American foreign policy must be asserted either by the accredited representative of a foreign government or by the Federal Government. No such assertion was made in the New York courts by the Government of Czechoslovakia or by the United States, and there has been no appearance herein by either sovereignty. Hence, the representatives of defendant-appellant, which is a mere private party litigant, have no standing to assert that Czechoslovakia's international position or the foreign policy of the United States present an issue requiring or justifying an appeal to this Court. See *Ex Parte Muir*, 254 U. S. 522; *Kunglig, etc.* v. *Dexter & Carpenter, Inc.*, 32 F. 2d 195, 200; *Lamont* v. *Travelers Insurance Company*, 281 N. Y. 362, 372, 24 N. E. 2d 281; *Holzer* v. *Deutsche Reichsbahn Gesellschaft*, 289 N. Y. S. 943, 160 Misc. 579; see also *The Navemar*, 303 U. S. 60.

Conclusion

WHEREFORE, for the reasons set forth in Respondent's Brief and in this Brief, it is respectfully submitted that appellant's jurisdictional statement has not indicated the existence of any substantial Federal question and that there is no warrant for an appeal to this Court. The motion to dismiss the appeal should be granted.

Respectfully submitted,

ASHER LANS,
64 Wall Street,
New York, N. Y.,
Attorney for movants, amici curiae.

ASHER LANS,
STANLEY N. QUELER,
of Counsel.